

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

KINNIE MA IRA; JEFFERY S.GRAMM
IRA; STACY GREASOR IRA; VICTOR
WADE IRA; KAZUE BELL; DEAN
CROOKS; CORRI RENE EDEN;
CATHERINE KOMINOS; KAREN
LOCH; ROBERT A. STONE LIVING
TRUST; SHIRLEY STONE LIVING
TRUST; THE STANLEY S. AND
MILLICENT R. BARASCH LIVING
TRUST; AND LORETTA DEHAY,

Plaintiffs,

v.

ASCENDANT CAPITAL, LLC, et al,

Defendants.

**UNOPPOSED MOTION TO DISMISS PLAINTIFFS' CLAIMS AGAINST DEFENDANT
STEVEN FRANGIONI WITHOUT PREJUDICE PURSUANT TO FED. R. CIV. P. RULE
41(a)(2)**

Plaintiffs Kinnie Ma IRA, Dean Crooks, Jeffery S. Gramm IRA, Stacy Greasor IRA, Corri Rene Eden, Catherine Kominos, Karen Loch, Robert A. Stone Living Trust, Shirley Stone Living Trust, Victor Wade IRA, Kazue M. Bell, The Stanley S. And Millicent R. Barasch Living Trust, and Loretta DeHay (collectively, "Plaintiffs") respectfully request dismissal of their claims against Steven Frangioni ("Frangioni") without prejudice pursuant to Rule 41(a)(2).

I. BACKGROUND

Frangioni is a defendant in this action, and has filed an answer (Dkt. 998). Plaintiffs have conferred with counsel for Frangioni and have agreed to dismiss their claims against Frangioni *without prejudice*, with Plaintiffs and Frangioni, respectively, each bearing their own fees and costs.

Frangioni is not opposed to the relief requested herein.

II. ARGUMENT

The Court Should Dismiss Plaintiffs' Claims Against Frangioni Without Prejudice

Plaintiffs seek to dismiss their claims against Frangioni without prejudice pursuant to Rule 41(a)(2). This Rule permits the dismissal by Court order of claims rather than entire actions. “Though Rule 41 speaks of dismissing an ‘action,’ the Fifth Circuit has interpreted it to allow plaintiffs to dismiss all of their claims against individual opposing parties.” *Abdullah v. Paxton*, No. 1:20-cv-01245-RP (W.D. Tex.), Dkt. 20 at 1 (order granting Rule 41 motion). “Generally, motions for voluntary dismissal should be freely granted, unless the non-moving party can show it would suffer some plain legal prejudice.” *Id.*; *see also Hubbard v. Blakemore*, 20-cv-767-RP, 2021 WL 5195803, at *1 (W.D. Tex. Aug. 4, 2021) (granting Rule 41(a)(2) motion to dismiss without prejudice where defendant opposed but showed no legal prejudice); *Sensis , Inc. v. LASIK Vision Institute, LLC*, 20-cv-1-RP, 2021 WL 3596302, at *1 (W.D. Tex. Mar. 17, 2021); *U.S. ex rel. Vaughn v. United Biologics, L.L.C.*, 907 F.3d 187, 196-97 (5th Cir. 2018).

With regard to the “plain legal prejudice” standard, “[t]ypical examples of such prejudice occur when a party proposes to dismiss the case at a late stage of pretrial proceedings, or seeks to avoid an imminent adverse ruling, or may on refiling deprive the defendant of a limitations defense.” *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, 628 F.3d 157, 162 (5th Cir. 2010).

No such harms are present here. Although it was filed in October 2019, this action is still in the discovery phase, and no trial date has been set. *See* Dkt. 1082 (setting schedule through class certification). The remaining defendants in this action will suffer no plain legal prejudice if the relief requested herein is granted.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court dismiss Plaintiffs' claims against Frangioni without prejudice.

Dated: April 19, 2023

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I do hereby certify that on April 19, 2023, a true and correct copy of the above and foregoing instrument was filed electronically through the Court's CM/ECF system, which will give notice of this filing to all parties.

/s/ Jesse Z. Weiss
Jesse Z. Weiss

CERTIFICATE OF CONFERENCE

Pursuant to Local Rule CV-7(G), I do hereby certify that counsel for Plaintiffs conferred with counsel for Frangioni regarding the relief request in this Motion, and Frangioni is unopposed to such relief.

/s/ Peter S. Linden
Peter S. Linden